United States Court of Appeals

for the Second Circuit

APPELLEE’S BRIEF

75-7425

IN THE

United States Court of Appeals

For the Second Circuit

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P/S

No. 75-7425

LOMBINO & SONS, INC., ANTHONY COMO and ORAZIO COMO, d/b/a COMO BROS., and THOMAS DEMARCO,

Plaintiffs-Appellants,

against

STANDARD FRUIT & STEAMSHIP COMPANY,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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Appeal From the United States District Court for the Southern District of New York

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BRIEF FOR DEFENDANT-APPELLEE

Issues Presented for Review

The basic issue on this appeal is whether the essential findings of fact are supported by the evidence. The District Court evaluated the testimony and other evidence and found that plaintiffs had shown no right to relief because they failed to prove: a) price variances were not the result of normal differences arising from varying times of placement of orders, and grade, quality and condition of the bananas; b) any connection between their claimed loss of customers, and sales by defendant to plaintiffs' competitors of bananas of the same grade and quality at lower prices; and c) actual damages or even probable damages.

If this Court concludes that the evidence, when taken as a whole and considered in a light most favorable to defendant, is sufficient to support the findings of fact, the judgment of the District Court should be affirmed.

Statement of the Case

This is an appeal from an order dated October 15, 1975, and judgment entered thereon, dismissing the amended complaint for failure to state a claim upon which relief could be granted. The dismissal is supported by the District Court's findings of fact and conclusions of law filed on October 1, 1975, which are reported at 1975-2 Trade Cases ¶ 60,527, and are reprinted at pages 597-604 of the appendix on this appeal.

The action was commenced on March 27, 1972, by three banana jobbers who purchased bananas from defendant, a producer and importer of bananas from Latin American countries. Plaintiffs sought treble damages under the Robinson-Patman Act § 2(a), 49 Stat. 1528 (15 U.S.C. § 13a) (the "Act"), and the Clayton Act § 4, 38 Stat. 731 (15 U.S.C. § 15), for alleged price discrimination in the sale of bananas by defendant to plaintiffs during the period March 29, 1968 to March 28, 1972.

Plaintiffs' witnesses at trial were Michael Lombino, plaintiff Anthony Como, Mary DeMarco, wife of plaintiff Thomas DeMarco, Steven S. Elbaum, John Fedele, a retired wholesale and retail banana merchant, and Andrew Russo, who was in the fresh fruit and produce business. Plaintiffs' direct examination consisted of 169 pages of testimony; cross examination took 133 pages of testimony. Thirteen exhibits were placed in evidence by plaintiffs.

At the close of plaintiffs' case, the District Court granted defendant's motion for dismissal under Rule 41(b), Federal Rules of Civil Procedure, on the ground that upon the facts and the law plaintiffs had shown no right to relief. (F[1] 597[2]) This conclusion is compelled by the Court's findings of fact and conclusions of law, which have abundant evidentiary support. In substance, the District Court found that plaintiffs had failed to establish any element of a *prima facie* price discrimination claim.

Statement of the Facts

The "Facts" portion of plaintiffs' brief does not fully or accurately set forth the facts developed at the trial. Plaintiffs' facts are supported by selective record references and, with but few exceptions, ignore the District Court's findings of fact.[3] In view of plaintiffs' distortion and disregard of the record, the facts as found by the District Court and supported by the evidence are set forth in this brief.

Plaintiffs Lombino & Sons, Inc. ("Lombino"), Anthony Como and Orazio Como d/b/a Como Bros. ("Como") and Thomas DeMarco ("DeMarco") were banana jobbers. (33; 198-199; 311) Plaintiffs purchased green bananas from banana importers which plaintiffs then ripened in specially equipped rooms in which the temperature was controlled and certain gases were released to control the ripening

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[1] F refers to the District Court's finding of facts and conclusions of law printed in plaintiffs' appendix.

[2] Unless otherwise indicated, parenthetical numerical references are to pages of the appendix.

[3] Although the District Court required the parties to submit proposed findings of fact and conclusions of law (387), plaintiffs failed to make any such submission.

process. At the appropriate time in the ripening process, usually after five to eight days, plaintiffs would sell and deliver their bananas to their customers. (119) The bananas purchased by plaintiffs from defendant came in various grades, and the quality of the bananas varied between countries of origin as well as between various locations within the same country. (F 598)

Defendant imported bananas from Latin American countries into the New York Metropolitan area. (37-38; F 598) Defendant's chief competitors were United Fruit Company, West Indies Fruit Company, and Pan American Fruit Company. (34; 37-38; 107; 328; F 598) Competition among defendant and its competitors was keen. (108; 265; 291-293) The banana business is a very volatile business in terms of supply, demand and price because of the highly perishable nature of the fruit. (115; 140-141; F 598-599) Plaintiffs were always aware of the "market price" of bananas available to them and at times would purchase their bananas from defendant's competitors to obtain a better price or more desired variety. (83; 107-109; 131; 313)

Lombino was in the banana business for 40 years. (34; F 598) Como was in the banana business for 15 years. (312; F 598) DeMarco had been in the banana business for 20 years. (198; F 598) In 1968 and 1969, Lombino purchased 75% to 85% of its bananas from defendant. (38; 107; F 597) In 1971 and 1972, however, Lombino purchased only 50% of its bananas from defendant. (257; F 597) Como purchased 60% to 65 of his bananas from defendant in 1968 and the first half of 1969. Thereafter, he went out of the banana business. (198; 202; F 597-598) During the four-year period, defendant's prices to plaintiffs were generally the same as those at which plaintiffs could buy bananas from defendant's competitors. (109; 329)

Because of the highly uncertain nature of the banana market, plaintiffs attempted to insure themselves of a regular supply of bananas by adopting the practice of placing an order with defendant at least one week in advance of the arrival of a vessel into the Port of New York. As a result of placing their orders in this way, both Lombino and Como were able to assure themselves of a supply of bananas for their regular customers. (130; 337; 342; F 599-600) It was also for this reason that Lombino and Como rarely purchased rollers,[4] although they were available to them. (67; 337) There was no testimony from DeMarco as to when he placed his orders for bananas with defendant, or whether and when he purchased rollers. Lombino's and Como's orders were placed at the seaboard price, the initial price defendant would ask for bananas the week before a cargo arrived and, consequently, the highest price charged for bananas of the same grade and quality from the same ship. (111; 337; F 599)

Lombino always demanded top quality bananas because its customers demanded a healthy banana. Its customers included fancy restaurants such as The Waldorf Astoria, Longchamps, The Statler Hilton, The Commodore Hotel, and Schraffts. (116; 146; F 599) It also delivered to Daitch-Shopwell Stores and Smiler's Fancy Delicatessens. (111-113; F 599) Como always ordered top quality bananas. (339; F 599-600) There was no testimony from DeMarco about the quality of the bananas he requested. Lombino and Como both delivered to their customers. (57; 333; F 600) As Lombino stated: "[s]ervice is my business." (113) Lombino always marked up his bananas $1.20

[4] "Rollers" is a term used in the trade to refer to distress bananas remaining unsold after a ship has discharged; the term derives from the custom of placing such fruit in a railway box car or trailer truck and rolling it across the country until a buyer can be found or the fruit spoils and has to be dumped.

a box regardless of what its competition was getting for bananas. (61; 96; F 600) Como always marked up his bananas 75¢ to $1.25 per box. (325; F 600) DeMarco offered no proof on his practice as to mark-up over cost or as to lost customers.

Lombino and Como both testified that they did not know the time at which their competitors placed their orders with defendant, or even if the bananas sold to plaintiffs' customers by competitors (who were the alleged beneficiaries of the discrimination) were purchased from the same vessel from which plaintiffs purchased. (153; 159; 342)

Between the time when plaintiffs placed their orders for bananas with defendant and the time when a vessel containing a cargo of bananas was discharged, defendant would often reduce the price of bananas of the same grade and quality on such vessel. (128-135; F 598-600) The purposes of such reductions by defendant were to increase the demand, to bring defendant's prices in line with the current market conditions, and to insure that defendant would not have any bananas left unsold upon discharge of the vessel. (131; F 599; F 601) Despite defendant's sales efforts, bananas would from time to time remain unsold after a vessel discharged. These bananas (rollers) were loaded onto trucks and sold at greatly reduced prices to avoid total loss, which would result if the bananas became rotten. (128-129; F 601)

Plaintiffs' chief competitors were large banana jobbers located in the New York City Metropolitan area, notably Frank Russo ("Russo") and D. Loi ("Loi"). (86; 315; 336; F 600) Russo and Loi each had 6 or 7 refrigerated rooms in which to store and ripen green bananas. (98; 253; F. 600) In addition, Russo sold other produce along with bananas. (130; 300; F 600) He was constantly in

communication with the banana market. (292; F 600) Russo usually placed a small order with defendant before the arrival of a vessel and waited until the vessel discharged before obtaining an additional supply of bananas from defendant. (132; 267; 311; F 600-601) Russo would purchase bananas from defendant's competitors whenever their price was better than defendant's. (291-293; F 601) He could afford to wait until prices were reduced by suppliers because he was not dependent on the sale of only bananas to make a living, as was the case with each plaintiff. (130; 342; F 600) There was similar testimony about Loi's business. (306) Russo usually purchased rollers and, as a result, was able to "average down" or sell bananas to his customers based upon his average cost of all bananas which he had purchased from all suppliers. (299; F 601) Neither Russo nor Loi delivered bananas to their customers. (144; 247-249; 336; F 601) Their volume was also greater than plaintiffs' volume. (F 601) Because of these factors, Russo, Loi and the other large banana jobbers had a lower overhead cost per sale and, consequently, could sell their bananas at less of a mark-up per box than plaintiffs. (336-337; F 601)

The District Court found that there was no evidence to show that the differences in price reflected on Exhibit 2 (a schedule of sales which the District Court found to be selective and incomplete, and which failed to reflect purchases of rollers by plaintiffs and their competitors) were not due to the time of placement of the order or "differences in grade, quality, or condition when, upon cross-examination of plaintiffs' witnesses, such price differentials were shown to be normal in the banana business." (F. 602) Plaintiffs also failed to demonstrate, even in the most preliminary fashion, any connection between their claimed loss of customers and sales of bananas of the same grade and quality by defendant to plaintiffs' competitors at lower prices. (F 603)

ARGUMENT

I

The District Court's findings are supported by substantial evidence.

Plaintiffs' argument on this appeal assumes that this Court should make findings of fact different from those of the District Court. Yet, plaintiffs make no significant attempt to overcome the basic rule that a Court of Appeals must accept the findings of fact of the trial court unless they are shown to be "clearly erroneous."

The limitations imposed on an appellate court by Rule 52(a) of the Federal Rules of Civil Procedure were set forth by the Supreme Court in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), as follows:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)."

This Court has frequently reminded appellants of the heavy burden they undertake when challenging the findings of a trial court. In *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 433 (2d Cir. 1945), Judge Learned Hand stated that "an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded. This is true to a considerable degree even when the judge has not seen the witnesses." Similarly in *Gruja* v. *United States Lines Company,* 337 F.2d 375, 376 (2d Cir. 1964), the Court declared: "an appellate court should not lightly substitute its judgment for that of the trier of fact." And in *United States ex rel. Fitzgerald* v. *E. J. LaVallee,* 461 F.2d 601, 604 (2d Cir.), *cert. denied* 409 U.S. 885 (1972), where the evidence appeared to weigh heavily against a state prisoner's application for a writ of habeas corpus, this Court affirmed the District Court's order granting the writ and asserted: "Since the credibility of Fitzgerald's testimony and the weight to be extended to it were matters to be determined by the trial judge, who observed the witnesses, we cannot say that the court's findings were clearly erroneous, doubtful as we may be as to whether any other judge would under all of the circumstances have extended much, if any, credibility or weight to it, or reached the same result."

The facts found by the District Court have been set forth at considerable length, with references to the supporting evidence. (See pp. 3-7, *supra.*) Plaintiffs' brief, in large part, ignores the evidence. Plaintiffs do not claim that the evidence supporting each finding is insubstantial or inadmissible; they apparently would prefer to believe that the evidence does not exist. Plaintiffs' brief conveniently overlooks many of the facts found by the District Court

and distorts others. For example, plaintiffs rely heavily in their brief (Br. 5) on the price differences of bananas, allegedly of the same grade, quality and condition, set forth in plaintiffs' Exhibit 2. (389-596) In so doing, plaintiffs simply ignore the finding that the District Court made concerning the reliability of Exhibit 2:

> "Plaintiffs attempted to prove price discrimination by introducing into evidence a chart which purported to demonstrate, *prima facie,* illegal price discrimination. This proof failed for several reasons: The schedule of purchases of bananas by plaintiffs from defendant and certain of plaintiffs' competitors was incomplete. The chart did not include all of the sales to all of plaintiffs' competitors from a particular cargo or sales from all of defendant's shipments of bananas into the New York metropolitan area from which plaintiffs obtained fruit. It admittedly did not reflect the entire pattern of sales by defendant to plaintiffs' competitors. It showed only those sales in which some of plaintiffs' competitors purchased at lower prices. It did not show the time when the purchases were first ordered. It did not show those purchases which constituted rollers.
>
> "Plaintiffs made no effort to show that such differences in price as the chart revealed were not the result of differences due to time of placement of the order or differences in grade, quality or condition, when, upon cross-examination of plaintiffs' witnesses, such price differentials were shown to be normal in the banana business." (F 601-602)

Plaintiffs further offered no proof that the general designations of bananas on Exhibit 2 did not have sub-classes of fruit of varying grades and quality.

In their brief (Br. 5-6), plaintiffs also distort defendant's (and indeed the banana industry's) pricing structure as found by the District Court. Plaintiffs assert that defendant had three established prices at which it sold bananas: the seaboard price, the reduced price, and the roller price. This view of the marketing of bananas completely ignores the District Court's findings and the evidence. Price reductions from the seaboard price were brought about by the dynamics of the market place and the highly uncertain nature of the banana market. (F 598-599) There was generally a declining spectrum of prices beginning with the seaboard price and declining to the roller price. (128-135; F 599)

Plaintiffs significantly concede (Br. 7), and the District Court found, that plaintiffs placed their orders with defendant in advance of the arrival of a vessel in port at the seaboard or highest price. (F 599) In an attempt to avoid the implications of such a concession, plaintiffs claim (Br. 8-9) that the burden was on defendant of showing that plaintiffs' competitors were able to wait until the defendant reduced its prices. This analysis completely ignores the evidence offered at the trial through plaintiffs' own testimony and documents which established, to the satisfaction of the trier of fact, that plaintiffs' competitors were able to take the risk that bananas from a particular vessel would be available at prices lower than the seaboard price, and that plaintiffs were not, or that they were unwilling to do so. (130; 306; F 600-601)

Plaintiffs would also have this Court believe (Br. 10) that the District Court completely overlooked the evidence in respect of plaintiffs' alleged loss of customers resulting from defendant's sales to plaintiffs' competitors. The District Court simply and correctly found that plain-

tiffs had failed to show any connection between the alleged diminution in plaintiffs' customers and defendant's sales of bananas to plaintiffs' competitors. (F 603) Plaintiffs, in fact, conceded at trial that they could show no damages. (364)

II

Plaintiffs did not establish a *prima facie* case of unlawful price discrimination.

Section 2(a) of the Act requires that, to be actionable, any discrimination must be in respect to purchases of "commodities of like grade and quality" and "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition for any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them . . ."

A. No Proof of Like Grade and Quality.

The Act first requires plaintiffs to plead and prove that the bananas involved in all sales of which they complain were of "like grade and quality". *Littlejohn* v. *Shell Oil Company,* 483 F.2d 1140 (5th Cir. *en banc* 1973), *cert. denied,* 414 U.S. 1116 (1973); *Atalanta Trading Corp.* v. *F.T.C.,* 258 F.2d 365 (2d Cir. 1958); *United Banana Company* v. *United Fruit Company,* 245 F.Supp. 161 (D. Conn. 1965), *aff'd,* 362 F.2d 849 (2d Cir. 1966). In this regard, the District Court found that "[t]here are various grades of bananas" and that the "quality of these bananas varies between countries of origin as well as between various locations within the same countries". (F 598)

"Like grade and quality" was discussed by this Court in the *Atalanta Trading Corp.* case, *supra,* where it said:

> "The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded. Such a holding would lead to the conclusion that all articles of food are competitive, each with the other—an obvious absurdity. Merely because various articles of food are derived from a common source (in this case, the pig), should not force the vendor of a broad line of such products to market or promote all simultanenously and in an identical fashion. The dietetic habits of the consuming public are not to be controlled by judicial fiat." 258 F.2d at 371

The whole purpose of the Act clearly dictates that plaintiffs must go beyond showing merely that green bananas were involved in all transactions or even that green bananas from the same country of origin were involved. Moreover, price differences charged to purchasers of bananas from the same vessel due to the perishable nature of bananas or changing market conditions over a number of days are not actionable under the Act. *F.T.C.* v. *Borden Co.,* 383 U.S. 637, 643 (1966). Obviously, the value of bananas that commence to ripen during the course of transportation from the tropics is substantially less than the value of bananas that arrive at the port of destination in a green condition. (F 598) Significantly, plaintiffs did not show that the bananas which their competitors were selling were purchased off the same vessel from which plaintiffs made their purchases. (53; 159; 342)

Plaintiffs thus did not meet their burden of showing purchases of bananas of "like grade and quality" as re-

quired by the Act. According to Rowe in his treatise (Rowe, *Price Discrimination under the Robinson-Patman Act* (1962) § 4.8, p. 76, fn. 136), such "a negative ruling on 'like grade and quality' automatically ousts the applicability of the Act."

B. No Proof of Substantial Lessening of Competition.

The District Court did not base its decision on the "lessening of competition" element of a *prima facie* Section 2(a) claim. However, the record shows that this element was not proven, and its absence supports the result reached below.

Section 2(a) makes unlawful only those discriminations in price which produce a specified adverse effect on competition. Price discrimination is not, *per se,* illegal. See *F.T.C.* v. *Simplicity Pattern Co.,* 360 U.S. 55 (1959). Price differentials alone are not enough for a violation of the Act. *F.T.C.* v. *Anheuser-Busch, Inc.,* 363 U.S. 536 (1960); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.,* 360 F.2d 896 (7th Cir. 1966).

Section 2(a) requires that any adverse competitive effect be substantial in order to make the Act applicable. See *e.g., Minneapolis-Honeywell Regulator Co.* v. *F.T.C.,* 191 F.2d 786 (7th Cir. 1951), *cert. denied,* 344 U.S. 206 (1952). The evidence must disclose a possibility that the price discrimination may substantially lessen competition. *Kohner* v. *Wechsler,* 477 F.2d 666 (2d Cir. 1973). As stated in *Minneapolis-Honeywell Regulator Co., supra,* "[w]e construe the Act to require substantial, not trivial or sporadic, interference with competition to establish violation of its mandate." 191 F.2d 786, 790. In *Whitaker Cable Corp.* v. *F.T.C.* 239 F.2d 253, 256 (7th Cir. 1956), *cert. denied,* 353 U.S. 938 (1957), and the companion case of

Edelmann v. *F.T.C.*, 239 F.2d 152 (7th Cir. 1957), the Court emphasized that "[t]he Act was not intended to reach every remote, adverse effect on competition" and stated the "discriminations which are negligible and which at best have a remote effect on competition are not within the prohibitions." It is the effect upon competition that must be shown before there is a violation and it must be substantial or that there is a reasonable probability that it may be substantial." *National Dairy Products Corp.* v. *F.T.C.*, 412 F.2d 605, 617 (7th Cir. 1969); *Timely Products Corp.* v. *Arron*, 1974-2 Trade Cases ¶ 75,250 (D. of Conn. 1974).

Although the Supreme Court stated in *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37 (1948), that the required injury to competition occurs when one has to pay substantially more for his goods than do his competitiors, a proper analysis of the holding will show that *Morton Salt* stands for the proposition that, in customer or "secondary line" competition cases, proof "of a substantial difference in prices charged competing customers" is simply a sufficient basis for a trier of fact to draw an inference of "competitive injury," and that such an inference is by no means required. Austin, *Price Discrimination* (1959), p. 89. As stated in Rowe's discussion of *Morton Salt* case, "[w]hile expounding a vigorous doctrine, the Supreme Court ordained no blanket or conclusive presumption as to competitive injury." *Rowe, supra,* § 8.3, p. 182. Moreover, he pointed out, "[t]he Court's opinion emphasized that it was condemning a substantial price discrimination arising from a volume discount system whereby some competitors were forced to pay respondent substantially more for their goods than their competitors had to pay. . . ." *Id.*

Finally, the *Morton Salt* doctrine has been confined to the competitive impairment created by the type of "dis-

criminatory pricing system" which gives large buyers a built-in, routine and permanent pricing advantage over smaller rivals. *American Oil Company* v. *F.T.C.*, 325 F.2d 101, 106 (7th Cir. 1963), *cert. denied,* 377 U.S. 954 (1964); see also *Borden Co.* v. *F.T.C.*, 381 F.2d 175 (5th Cir. 1967). The Court in *American Oil Company* v. *F.T.C.* deemed the "relatively minor and temporary loss of business" by those dealers paying higher prices inadequate to demonstrate the requisite substantial lessening of their "ability to compete." *Rowe, supra,* § 6.6, supp. p. 21; see also *Austin, supra.* p. 42. In fact, the Court of Appeals for the Seventh Circuit, in reaching its decision in *American Oil Co.* v. *F.T.C., supra,* followed the Supreme Court's own formulation in *F.T.C.* v. *Sun Oil Co.,* 371 U.S. 505 (1963), where the Supreme Court said:

> "[I]n appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive effects. Any evaluation of mechanical work formulas cannot be made to substitute for adequate probative analysis." 371 U.S. at 527.

Indeed, Rowe suggests that "[t]o the extent Section 2(a) is applied to inhibit small price variations which have no substantial impact on the market, competition is thwarted rather than fostered by law." *Rowe, supra* § 6.6, p. 135.

Plaintiffs' heavy reliance (Br. 22) on *Foremost Dairies* v. *F.T.C.*, 348 F.2d 674 (5th Cir. 1965), in support of their argument that the court may infer the fact of competitive injury merely from a showing of price discrimination is misplaced. In that case, the court was faced with the issue of determining whether the facts found by the Federal Trade Commission were supported by substantial evidence.

While recognizing that price discriminations were not *per se* illegal, the Court stated that it "must defer to the [Federal Trade] Commission the task of drawing the inference of a probable injury to competitors so long as that inference is supported by a reasonable quantum of evidence in the record". *Id.* 680. The Court went on to list a series of substantial facts in the record which supported the F.T.C.'s inference of competitive injury. The Court also distinguished *American Oil Co.* v. *F.T.C., supra,* on the principal ground of the duration of the price discriminations under review.

Assuming such an inference can be drawn in a proper case, it is clear from the record on this appeal that an inference of competitive injury was not drawn by the District Court, nor can such injury reasonably be inferred. In the first place, what is complained of are a number of sporadic, selected, and unrelated transactions, rather than a pattern of discrimination. The most cursory examination of the evidence demonstrates that there was a range of prices involved in the sales arising from defendant's shipments of bananas into New York. Plaintiffs have arbitrarily chosen to complain of occasions when they did not end up with what appears to be the best price. Moreover, plaintiffs could and did buy bananas from other suppliers. (F 597) In fact, Lombino appears to have purchased one-half of his supply from other suppliers during the latter part of the period complained about. (F 597) It is obvious, therefore, that there was no anti-competitive effect resulting from defendant's pricing practices. Indeed, competition was fostered in respect to those purchasers who took advantage of the various market conditions affecting the price for bananas.

Furthermore, bananas are not immediately resold, but are retained in ripening rooms for ripening. (118-120)

Thus, any particular group of bananas sold by plaintiffs or one of their competitors to any particular retailer can consist of bananas from different cargoes and from different importers. This factor even further defuses any conceivable competitive effect of any possible sporadic price variations between plaintiffs and their competitors. The fact that the alleged discrimination involves a diverse group of competitors (389-596) is also of great significance on the issue of substantiality. Discrimination in favor of different competitors at different times and not according to any pattern, even if provable, would not result in the required detrimental effects on competition. The leading commentators on the Act have pointed out that, despite "free wheeling dicta" in the *Morton Salt* decision, what must be proved in an action under Section 2(a) is an adverse effect on competition and not just on an individual competitor. *Rowe, supra,* § 6.5. *The Report of the Attorney General's Committee to Study the Antitrust Laws* (1955) states in this regard that: ". . . it is not 'injury' to competitors but adverse effects on competition with parties privy to discriminations that the statute expressly forbids." (p. 165)

Plaintiffs claim (Br. 20) that, even if they cannot meet the "injury to competition" test under the Act, injury to the plaintiffs is really all that is required under the holding in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961). *Radiant Burners* is not in point. In that case, the Supreme Court, in reversing an order dismissing a complaint alleging a conspiracy in restraint of trade in violation of section 1 of the Sherman Act, merely held that:

> "The conspiratorial refusal 'to provide gas for use in the plaintiff's Radiant Burner[s] [because they] are not approved by AGA' therefore falls

> within one of the 'classes of restraints which from their 'nature or character' [are] unduly restrictive, and hence forbidden by both the common law and the statute. . . . As to these classes of restraints . . . Congress [has] determined its own criteria of public harm and it [is] not for the courts to decide whether in an individual case injury [has] actually occurred.' " 364 U.S. at 659-660

Even under the Sherman Act, however, proof of purely personal damages does not establish the necessary element of a restraint on commerce. *Harrison* v. *Prather,* 435 F.2d 1168 (5th Cir. 1970). Plaintiffs' reliance on *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co., supra,* is further inapposite because it involves a *per se* violation of the Sherman Act, which by its very nature had a monopolistic tendency. In any event, as discussed *infra* at pp. 20-24, plaintiffs have not shown any personal injury causally connected to price differences.

Continental Baking Co. v. *Old Homestead Bread Company,* 476 F.2d 97 (10th Cir. 1973), also cited by plaintiffs (Br. 12,20) in support of their inference theory of competitive injury, was a primary line injury case concerning the sale of a private label brand of bread at lower prices than "Wonder Bread" which, it was conceded, was of the same grade and quality. The Court there simply found that the injury to competition requirement is satisfied "[i]f plaintiffs here can show that this price discrimination had a tendency *to create a monopoly* in their line of commerce." *Id.* 103 (emphasis supplied). There is no evidence in the instant record to support such a finding, and the District Court did not so find.

This case is also distinguishable from *American Can Co.* v. *La Doga Canning Co.,* 44 F.2d 763 (7th Cir.), *cert.*

denied, 282 U.S. 899 (1930) (cited at Pl. Br. 22), also a Sherman Act case, in which the Court found substantial evidence in the record establishing that the price discriminations alleged there were not made in good faith on account of differences in quantity.

In short, the established rules for determining the existence of competitive injury under Section 2(a) mandate the conclusion that the required showing of competitive injury has not been made in this case.

C. No Proof of Damages Arising From Price Differences

Even if plaintiffs had shown that their claims were otherwise within the ambit of the Act, they have not demonstrated that they were damaged by price differences. As a result of Judge Learned Hand's famous decision in *Enterprise Industries* v. *Texaco Inc.,* 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957), it is clear in this Circuit that plaintiffs have the burden of proving that they sustained actual damages by reason of any price discrimination. See also, *Krieger* v. *Texaco, Inc.,* 373 F.Supp. 108 (W.D.N.Y. 1973); *Guyott Co.* v. *Texaco, Inc.,* 261 F.Supp. 942 (D. Conn. 1966); *Albert H. Cayne Equipment Corp.* v. *Union Asbestos & Rubber Co., supra; Sano* v. *American Oil Co.,* 187 F.Supp. 345 (E.D.N.Y. 1960). The *Enterprise* case has been followed outside this Circuit. See *e.g., Kidd* v. *Esso Standard Oil Co.,* 295 F.2d 497 (6th Cir. 1961); *McCaskill* v. *Texaco Inc.,* 351 F.Supp. 1332 (S.D. Ala. 1972), *aff'd,* 486 F.2d 1400 (5th Cir. 1973).

In the *Enterprise* case, a gasoline service station operator sued an oil company for violating the Act by charging it a higher price for gasoline than that charged to other service station operators which were engaged in a gasoline price war. In reversing the District Court, which had held

the measure of damages under the Act to be the difference between the sales price charged the plaintiff and the lowest price charged any of its competitors, Judge Hand ruled that the amount of the discriminatory price difference was not the proper measure of loss, distinguishing the dicta in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947), as follows:

> "In that case the addition of 5% to the cost to the plaintiff of its cans . . . might well not have been passed on to the consumer, and have been absorbed by the canners, who sold fruit juices in cans. If that were true, the amount of the discrimination *might* well be a proper measure of the buyer's damages. On the other hand, in the case at bar we have as little means of knowing whether or how far the plaintiff passed on . . . any difference in the price charged it, as we have of knowing how far the addition affected the gallonage that it sold." *Enterprise Industries* v. *Texaco Co., supra,* at p. 459 (emphasis supplied).

Thus, as Judge Timbers aptly wrote in *Guyott* v. *Texaco, supra*:

> ". . . the measure of recovery in a suit by a private party seeking to enforce the Robinson-Patman Act is *actual* injury." 261 F.Supp at 952.

Plaintiffs suggest, despite the District Court's contrary finding (F 603-604), that there is ample proof in the record to establish that they were damaged by the alleged price discrimination. As previously pointed out, however, this Court cannot substitute its findings for those of the trial court unless they are "clearly erroneous". Plaintiffs further argue (Br. 24-26) that the damage rule in effect

in this Circuit since the *Enterprise* decision should be set aside and damages awarded based on pure speculation. In support of their argument, plaintiffs cite *Straus* v. *Victor Talking Machines,* 297 Fed. 791 (2d Cir. 1924) (which predates the Act), and *Hanover Shoe* v. *United Shoe Machinery Co.,* 392 U.S. 481 (1968) (a Sherman Act case).

In *Straus* v. *Victor Talking Machines, supra,* the plaintiffs sued under section 7 of the Sherman Act and section 4 of the Clayton Act for damages arising out of an illegal restraint of trade. The plaintiffs argued that they were entitled to buy goods in a free market, but were prevented from doing so by the defendants' illegal combination, thereby compelling them to pay a higher price for their goods. There is no evidence in the instant case that plaintiffs were prevented from obtaining their goods in a free market. Indeed, they had the same opportunity as their competitors to sit back and wait for price reductions, see *United Banana Company* v. *United Fruit Company, supra,* 178, or to buy from defendant's competitors. The District Court found, however, that plaintiffs could not run the risk that they would end up without bananas. (F 599; 600)

Similarly, the plaintiff in *Hanover* v. *United Shoe Machinery Corp., supra,* claimed that the defendant had monopolized the shoe industry in violation of section 2 of the Sherman Act and that it should recover the difference between what it paid defendant in shoe machine rentals and what it would have paid had the defendant been willing to sell those machines to the plaintiff. As already noted, however, plaintiffs here had every opportunity to purchase

bananas at any point in the spectrum of prices between defendant's seaboard price and the roller price,[5] subject only to the risk of not being able to obtain bananas should defendant sell out before plaintiffs' orders were placed.

The *Enterprise* principle of damages has not been diminished or overruled by any of plaintiffs' cited cases and must be applied. The *Enterprise* principle has been followed in this circuit as recently as 1973 in *Krieger* v. *Texaco, Inc., supra.* The case of *Fowler* v. *Gorlick,* 415 F.2d 1248 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012, also cited by plaintiffs, although not following *Enterprise,* proffered no cogent reason why the *Enterprise* case should not continue to be followed in this Circuit. Applying the *Enterprise* principle to plaintiffs' claims, it is readily apparent, both from the District Court's findings and the evidence, that plaintiffs have not proved that they were damaged. Lombino and Como applied a standard mark-up to the cost of a box of bananas irrespective of the price to them. (F.600) DeMarco offered no proof on this point. No plaintiff offered proof connecting the claimed loss of customers with the alleged discriminatory sales. On the other hand, the record is replete with reasons why the alleged loss of customers was unrelated to the sale of bananas to plaintiffs' competitors at lower prices. For instance, Lombino and Como delivered their bananas; neither Russo nor Loi delivered. This factor obviously increases overhead which must be

[5] Even if defendant had refused to sell rollers to plaintiffs, defendant would not have violated the Act, since "[n]othing in the Robinson-Patman Act imposes upon a supplier an affirmative duty to sell a particular commodity to all potential customers", *Atalanta Trading Corp.* v. *F.T.C.,* 258 F.2d 365, 372-3 (2nd Cir. 1958); *Mullis* v. *Arco Petroleum Corp.,* 502 F.2d 290 (7th Cir. 1974); *Shawver & Son, Inc.* v. *Oklahoma Gas & Electric Company,* 463 F.2d 204 (10th Cir. 1972); *Naifeh* v. *Ronson Art Metal Works,* 218 F.2d 202 (10th Cir. 1954); *Shaw's Inc.* v. *Wilson-Jones Co.,* 105 F.2d 331 (3rd Cir. 1939).

offset by an increased mark-up. Plaintiffs' competitors also took advantage of the banana market by purchasing all or part of their orders after a vessel had arrived in port and were thus able to offer such fruit to their customers at reduced prices.

III

Any differences in price were caused by the perishable nature of bananas or changing market conditions.

Plaintiffs' own proof established that any differences in prices between those charged to plaintiffs and their competitors for bananas of like grade and quality were due either to changing conditions affecting the market, or the marketability of the bananas involved due to their highly perishable nature and related factors. The Act expressly recognizes that price differences based on such market dynamics are legal. A proviso to Section 2(a) thus states:

> "And provided further, that nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods. . . ."

As found by the District Court, a common characteristic of bananas is that they are perishable. (F 598) In the life of every banana there comes an inevitable date when it is of no economic value. If a banana is not sold before that date, it will never be sold. There are, as found by the District Court, inevitable fluctuations in the supply of bananas due to a variety of factors connected with the production and distribution processes. Buying patterns and other factors, including weather, also create fluctua-

tions in demand by the consuming public for ripened bananas and corresponding fluctuations in the demand of jobbers such as plaintiffs. Thus, there is no clearly defined regular market price for bananas. (F 598-599) If some fruit remains unsold on the completion of discharge of the vessel and becomes rollers, it must be sold at the best prices obtainable, which due to imminent perishability usually is well below the originally established seaboard price. (F 599)

It can be seen that the time at which a purchaser of bananas enters his order or makes his purchase is of great significance in the banana business. Obviously, a seller of bananas is in a better position to get its asking price with respect to orders entered prior to the arrival of a vessel. In periods when there does not appear to be an oversupply of fruit, purchasers are likely to place their orders in advance of arrival of vessels in order to attempt to insure their ability to purchase a share of a cargo. On the other hand, purchasers such as Russo and Loi who are not concerned with the possibility that they may be too late to obtain any fruit would hold back from entering their orders, or part of their orders, to attempt to purchase later at a lower price. (F 600-601)

The District Court found that plaintiffs were always concerned that they have an assured supply of the best bananas, since they relied primarily on supplying a constant group of quality customers on a regular basis. (F 599-600) Plaintiffs invariably ordered only the choicer bananas in any cargo from which they obtained fruit. In order to be assured of a supply of fruit, plaintiffs placed their orders for the best bananas in advance of the arrival of whatever cargo was involved. (599-600) There were, however, variations in the prices between the time plaintiffs ordered and the time when the vessel was unloaded. (128; 235) In fact,

some of such transactions involved the sales of rollers which were available to all of defendant's customers. (67; 128; 337)

Defendant's sales practice of lowering its prices when necessary to sell distress bananas is not unique. Indeed, it has been recognized as permissible under the Act by the Federal Trade Commission, pursuant to its *Trade Practice Rules for the Fresh Fruit and Vegetable Industry,* promulgated April 15, 1965 (16 C.F.R. 74.1(c)).

Rowe points out in his discussion of the "changing conditions" proviso that:

> "[s]o long as the 'changing condition' affecting the market for the seller's products is an objective external market change genuinely motivating the price variation, the proviso could come into play to exonerate the price." *Rowe, supra,* § 11, p. 322.

Rowe is consistent in this regard with the position of the Attorney General's Committee to Study the Antitrust Laws. As noted by the Committee:

> "Because we view the 'changing conditions' proviso as designed to promote competitors' freedom to react realistically to the spontaneous movements of a dynamic market, a broad interpretation of this provision would, in our opinion, comport best with the Congressional intent as well as broader antitrust objectives. We believe, therefore, that an independent and significant meaning might be accorded to the statutory phrase 'changing conditions affecting the market' to which a competitor might respond by revising his price—wholly apart from the 'marketability of the goods concerned,' the second statutory factor which the enumerated examples in the proviso illustrate. In any event, we view the significant com-

> mon denominator in these far from homogeneous examples *not* as a deterioration of the seller's goods or business position, but as a *spontaneous shift in market conditions beyond the seller's control.* The proviso should enable a seller to reflect such commercial adjustments in good faith by revised price quotations on short notice, though this may incidentally prejudice some customers who bought at less favorable prices in the immediate past. We equally recommend a realistic interpretation to protect a seller's flexibility in adapting his prices to perceptible market shifts, whether already under way or only impending." *Report of the Attorney General, supra,* pp. 178-179.

The scope of the proviso was made clear by Representative Patman, in his *Complete Guide to the Robinson-Patman Act* (1963), p. 88, as follows:

> "It is intended to provide for continuance of the normal and economically justifiable freedom of action that will permit a seller to dispose of goods on hand where he is threatened with immediate or imminent loss as a result of changing marketing conditions, deterioration, or obsolescence of the goods themselves, or any other similar circumstance that requires the sudden and immediate movement of goods on hand to avoid losses resulting from conditions beyond his control. The Act gives him the legal right under such conditions to dispose of the goods at whatever price may be obtained, without regard to differences in costs or undue concern for discrimination between purchasers."

Thus, "[a] discrimination under the Robinson-Patman Act does not come about where differences in price terms or

conditions between several transactions result from diverse market conditions rather than from an intent to discriminate." *Texas Gulf Sulphur Company* v. *J. R. Simplot Company*, 418 F.2d 793, 807 (9th Cir. 1969). As the Supreme Court stated in *F.T.C.* v. *Borden Co., supra,* at p. 643, the Act "proscribes unequal treatment of different customers in comparable transactions. . . ." Moreover, as the *Report of the Attorney General, supra,* states:

> "The prohibitions of the statute presuppose discriminatory treatment of customers in analogous transactions involving similar goods under comparable market conditions at approximately the same time." (at p. 178)

Although it is generally the defendant's burden to establish that the proviso is satisfied, defendant did not have to offer any such proof in this case because the trial testimony[6] showed that a more classic case of "changing marketing conditions" or "deterioration" of perishable goods would be hard to find than that developed on plaintiffs' own evidence. Accordingly, even if plaintiffs were able to sustain their respective burdens of bringing their claims otherwise within the Act, the changing market proviso of the Act precludes a *prima facie* claim of price discrimination on the facts of this case.

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[6] Cross examination of plaintiffs' witnesses was almost as extensive as plaintiffs' direct examination (see p. 2, *supra*).

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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